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NO. 92-1263

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

EARLINE CHABERT,
Petitioner,

versus

THE SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED

The Southern Pacific Transportation Company submits that the only appropriate issues presented for review are whether:

1) The Court of Appeals properly affirmed the District Court's Judgment in favor of respondent, The Southern Pacific Transportation Company, and against petitioner, Earline Chabert;

2) The Court of Appeals properly considered Louisiana law and applied it to the facts, as found by the District Court.

PARTIES TO THE PROCEEDING

In accordance with Rule 29.1, the respondent corporation, The Southern Pacific Transportation Company, lists the following parent, subsidiary and/or affiliated companies:

SPTC Holding, Inc.
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
Pacific Fruit Express Company
Pacific Motor Transport Company
St. Louis Southwestern Ry. Co.
Dallas Terminal Ry. and Union Depot Company
The Southwestern Town Lot Corporation
The Alton & Southern Ry. Company
Arkansas & Memphis Railway Bridge & Terminal Company
Kansas City Terminal Railway Company
Southern Illinois & Missouri Bridge Company
Terminal R.R. Assoc. of St. Louis
Trailor Train Company
Southern Pacific Air Freight, Inc.
Southern Pacific Equipment Company
Southern Pacific International, Inc.
Southern Pacific Marine Transport, Inc.
Southern Pacific Motor Trucking Company
Southern Pacific Telecommunications Company
Digital Signal, Inc.
Southern Pacific Warehouse Company
Visalia Electric Railroad Company
Central California Traction Company
The Ogden Union Ry. & Depot Co.
Portland Terminal Railroad Co.
Portland Traction Company
Sunset Railway Company
Rio Grande Industries, Inc.
Rio Grand Holding, Inc.

PARTIES TO THE PROCEEDING (continued)

The Denver and Rio Grande Western Railroad Company
Rio Grande Motor Way, Inc.
Rio Grand Land Company
Denco System, Inc.
Montwood Corporation
Personnel Scheduling Technology, Inc.
San Marco Pipeline Company
SKCC Acquisition Corporation
Transportation Service Systems, Inc.
Container Bridge, Inc.
Rio Grande Receivables, Inc.
SPCSL Corporation
SP Environmental Systems, Inc.
The Anschutz Corporation
The Morgan Stanley Leveraged Equity Fund II, L.P.

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CITATIONS TO OPINIONS BELOW

Petitioner seeks review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit (App. 12-27), reported at 973 F.2d 441. The Court of Appeals (App. 28-29) denied petitioner's Petition for Rehearing. The Court of Appeals affirmed the Judgment and Reasons for Judgment of the District Court (App. 1-11), which are unreported. The District Court denied petitioner's Motion for New Trial (Respondent's App. A-1 - A-5), which is unreported.

STATEMENT OF CASE

Respondent takes issue with petitioner's statement of the case in certain significant areas. Accordingly, respondent submits that a more accurate statement of the case is as follows:

On November 3, 1982, Thomas J. Chabert, husband of the petitioner, while in the employ of The Southern Pacific Transportation Company ("SOPAC") was killed in an accident on the Greater New Orleans bridge. On February 16, 1983, SOPAC paid a death benefit in the amount of $132,000 to Earline Chabert ("Chabert"), pursuant to Article 5 of the National Agreement (the "National Agreement"), which existed between SOPAC and the Brotherhood of Railway, Airline and Steamship Clerks, Freighthandlers, Express and Station employees. The National Agremement provided as follows:

> The carrier shall be subrogated to any right of recovery an employee or his personal representative may have against any party for loss to the extent that the carrier has made payments pursuant to this article.

In accordance with Article 5 of the National Agreement, contemporaneously with the payment of $132,000, SOPAC and Chabert executed an agreement which provided that

SOPAC was subrogated to Chabert's rights. The subrogation agreement provided as follows:

> In consideration of the payment of $132,000 as aformentioned both parties agree to be governed by all of the terms, conditions, and provisions of the off-track vehicle agreement, including, but not limited to, the off-set and subrogation provision thereof... .

On May 27, 1983, Chabert filed a Petition for Damages against various third-party defendants in Louisiana State Court, seeking damages suffered by herself and her two minor children arising out of the death of her husband (the "Jefferson Parish Litigation"). SOPAC was not named as a party in the Jefferson Parish Litigation, nor did it intervene in the suit. However, SOPAC placed Chabert on notice of its right to reimbursement under the agreement.

On several occasions during the course of the Jefferson Parish litigation, Chabert's attorney contacted counsel for SOPAC in an attempt to persuade SOPAC either to contribute to the cost of litigating the case, or to reach an agreement as to how the monies recovered, if any, would be shared. SOPAC repeatedly refused Chabert's proposal to modify in any way the agreement which had been reached by SOPAC and Chabert on February 16, 1983.

In early July 1987, SOPAC learned from one of the defendants in the Jefferson Parish litigation that the action was near settlement. On or about July 7, 1987, counsel for Chabert represented to counsel for SOPAC that no meaningful settlement negotiations had taken place, and again attempted to obtain SOPAC's agreement to reduce its $132,000 claim by contributing to the costs and attorney's fees incurred in recovering same.

The claims asserted in the Jefferson Parish litigation were compromised and settled in consideration of the payment of $825,000 to Chabert, individually, and as tutrix

and administratrix of the estates of her two minor children. As part of the settlement, Chabert agreed to indemnify the tortfeasors against any claims of SOPAC. Chabert and her attorney recommended the settlement to the court stating that the "compromise settlement offered is entirely fair and should be accepted." On Chabert's recommendation, the settlement was approved by the court on behalf of her minor children. The settlement of Chabert's lawsuit was read into the court record, and her attorney acknowledged SOPAC's lien claim and stated, "we're going to hold harmless and indemnify all of the defendants as to the Southern Pacific lien." Chabert was aware that SOPAC was claiming the right to $132,000 out of any settlement or judgment she received and that SOPAC might institute action against her.

As submitted by Chabert and her counsel, and approved by the court, Chabert attributed $115,500 of the settlement to each of her two children, attributing the $594,000 balance to herself.

The settlement agreement reached by Chabert in the Jefferson Parish litigation was a fair one. The $825,000 received pursuant to that settlement fully compensated Chabert and her children for their losses.

Despite amicable demand, Chabert did not pay the $132,000, or any part thereof, to SOPAC, after the settlement was funded by the defendants in the state court action. SOPAC then sued Chabert to recover the $132,000.

The District Court fully considered the expert testimony offered into evidence, as well as the testimony of Chabert and her counsel concerning the value of her case, and rightfully concluded that she had been fully compensated for the wrongful death of her husband.

On appeal, the United States Court of Appeals for the Fifth Circuit reviewed the District Court's findings, and affirmed, again correctly considering and applying the

law of Louisiana and, like the District Court, found that Chabert had been fully compensated for the wrongful death of her husband.

SUMMARY OF ARGUMENT

NO REASON TO REVIEW

This matter is not appropriate for review by this Court. There is no dispute among the Circuits. The Court of Appeals did not so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by the lower court, as to call for an exercise of this Court's power of supervision. The Court of Appeals correctly applied Louisiana State law, and did not decide any state law questions in a way in conflict with any decision of the Louisiana Supreme Court, but, rather, applied the law consistently with the Louisiana cases on the question of compensation for wrongful death.

LOWER COURTS WERE EQUITABLY CORRECT

The District Court and the Court of Appeals correctly recognized that Earline Chabert had entered into a subrogation agreement which required her to reimburse SOPAC the sum of $132,000 from any recovery she made from third parties. Having received a total of $825,000 in settlement, of which she attributed $594,000 to herself, Earline Chabert was fully compensated for the wrongful death of her husband. Accordingly, the Court of Appeals properly held that SOPAC was entitled to be reimbursed under the terms of the subrogation agreement.

UNDER THE STANDARD OF
REVIEW APPLICABLE, THE COURT
OF APPEALS' DECISION WAS CORRECT

Under Rule 52 of the Federal Rules of Civil Procedure, the findings of a trial court can only be disturbed if clearly erroneous. A trial court's decision to credit one

testimony over another, where that version of the facts is not internally inconsistent, can never be clear error. Similarly, the trial court's determination of damages can only be set aside if clearly erroneous. Applying this standard of review, the decision of the Court of Appeals was correct as the district court's judgment was not clearly erroneous.

ARGUMENT

THERE IS NO REASON TO GRANT A WRIT IN THIS ISOLATED CASE

This matter is not appropriate for review by this Court. There is no dispute among the Circuits. The Court of Appeals did not so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by the lower court, as to call for an exercise of this Court's power of supervision. The Court of Appeals correctly applied Louisiana State law, and did not decide any state law questions in a way in conflict with any decision of the Louisiana Supreme Court, but, rather, applied the law consistently with the Louisiana cases on the question of compensation for wrongful death.

Petitioner cannot point to a major legal issue raised by this proceeding having any impact outside of this single case. Petitioner has not cited any cases which represent a conflict with any decision of the Louisiana Supreme Court, and the decision by the Court of Appeals is consistent with cases of the Louisiana intermediate appellate courts. This decision is consistent with existing jurisprudence in Louisiana, and this Court should not consider the matter further at this time.

Respondent submits that there is no reason to grant Earline Chabert's Petition for Writ of Certiorari. The considerations governing review of a Writ of Certiorari are set forth in the Rules of the Supreme Court of the United States, Rule 10. The considerations set forth in Rule 10 do

not justify the granting of a Writ of Certiorari in this case. This matter has been reviewed twice by the federal district court Judge, and twice by the Fifth Circuit panel. Unanimously and consistently, the Judges have found the decision proper. There is no dispute amongst the Judges who handled this case as to the correct application of Louisiana law to the facts of this case.

Petitioner has not pointed to any, nor can she point to any, special or important trend or development in the law implicated in this decision. There is simply no important question of federal or state law which should be settled by this court at this time.

Supreme Court Rule 10 is a restatement of prior Supreme Court Rule 19. This court has explained the importance of restricting review to cases involving "special and important reasons" for granting a Writ of Certiorari. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, at 73-74, 75 S.Ct. 614, at 616 (1955). No special or important reason exists for the granting of a Writ of Certiorari in this case.

THE LOWER COURT, AS AFFIRMED BY THE FIFTH CIRCUIT, WAS CORRECT, AND CERTAINLY NOT CLEARLY ERRONEOUS, IN FINDING THAT EARLINE CHABERT WAS FULLY COMPENSATED FOR THE WRONGFUL DEATH OF HER HUSBAND

The District Court's finding of fact that Chabert was fully compensated for her damages as a result of the settlement of a tort suit brought by her against third-party tortfeasors, was not clearly erroneous as decided by the Court of Appeals for the Fifth Circuit. The evidence presented at trial showed that Chabert accepted the settlement as entirely fair and recommended the settlement to the court on behalf of her minor children. At the same time, Chabert was fully aware that SOPAC was claiming the right to $132,000 out of the settlement she received. Evidence of

Mr. Chabert's earnings history and the testimony of an expert economist support the conclusion that Chabert was fully compensated for her loss by the $825,000 she received. Moreover, the amount received by Chabert greatly exceeded average damage awards at the time of Chabert's settlement. *See Thomas v. State Farm Insurance Company,* 499 So.2d 562, 566 (La. App. 2nd Cir. 1986), *cert. denied,* 501 So.2d 213 & 215 (La. 1987). Under the circumstances, the court correctly found that Chabert's defense that she was not fully compensated was meritless.

The Court of Appeals in this action correctly concluded that under a conventional subrogation agreement, where the subrogor has been fully compensated for her injuries, the partial subrogee may directly recover from the subrogor amounts previously paid. *Smith v. Manville Forest Products Corp.,* 521 So.2d 772 (La. App. 2nd Cir. 1988); *See also Audubon Insurance Company v. Farr,* 453 So.2d 232, 235 (La. 1984). The evidence presented at trial clearly supported the judge's finding of fact that the $825,000 settlement received by Chabert, individually and as tutrix and administratrix of the estates of her two minor children, fully compensated Chabert and her children for their damages. This finding of fact cannot be disturbed unless proven to be clearly erroneous. *See Clark v. Mobil Oil Corp.,* 693 F.2d 500, 501 (5th Cir. 1982) (a trial court's finding on the issue of damages can be set aside only if clearly erroneous).

A review of the evidence presented at trial amply supports the District Court's finding. For example, the evidence presented at trial showed that Chabert accepted the settlement she received on behalf of herself and her two minor children with full advice of counsel. Chabert stated to the court that she was "...satisfied to accept the sum of $825,000.00" and that she was of the opinion that the settlement set forth in the Receipt, Release and Compromise Agreement and Indemnity Agreement was "reasonable and proper under the circumstances." Moreover, Chabert, as natural tutrix of her two minor children, and Alice Dufrene Clayton, as under tutrix, recommended the settle-

ment to the court on behalf of the two minor children as "entirely fair" and the court granted their petition to compromise the claims of the minors.

Significantly, at the time she accepted the settlement, and represented the settlement as fair and proper to the court, Chabert was fully aware that SOPAC was claiming the right to $132,000 from the monies she received in the settlement and that SOPAC might institute action against her. Reconfirming Chabert's knowledge in this regard, on September 14, 1987, counsel for Chabert wrote and advised her that "the agreement signed by you dated February 16, 1983 may still be enforceable in full or in part, and you may be held liable for the entire $132,000, for court cost, for interest and for other associated expenses in the event that suit is filed by SOPAC against you."

Evidence presented at trial showed that during 1981, the last full year worked by Thomas Chabert prior to his death, he earned $23,005.62 as an employee with the railroad. During 1981, Thomas Chabert worked 2,455 hours. Furthermore, from January 1 through November 3, 1982, Mr. Chabert earned $22,065.53 as an employee with the railroad, having worked 2,130 hours. The tax returns of the Chaberts, presented at trial, reflected losses in connection with the Chaberts' real estate ventures. In addition, Mr. Chabert's tax returns reflect *de minimis* income from occasional part-time plumbing work.

The testimony of an expert economist, using an annual rate of increase of 4%, established that Chabert's loss from the date of the accident to July 13, 1987, the date of the settlement, was $83,686.93 and a mid-point future loss was $247,566.50. According to the expert economist's testimony, Chabert's loss, assuming no change in the wage base, reflected a past loss of $76,298.54 and a mid-point future loss of $205,403.58.

In addition to the foregoing, SOPAC presented into evidence data reflecting judgments and settlements in all

death cases arising out of the death of SOPAC employees. In the years 1972 through 1989, this data reflected an average settlement or judgment recovery of $182,883.00 per case. SOPAC data reflecting settlement and judgment in death cases arising out of accidents in the years 1972 through 1989, excluding all zero recovery cases, reflected an average settlement or judgment recovery of $206,787.00 per case. SOPAC death case settlements and judgments in the year 1987, the year Chabert settled the claims arising out of her husband's 1982 death, reflected an average recovery of $239,000.00 per case.

Obviously, the District Court's finding of fact that the settlement reached by Chabert with the defendants in the Jefferson Parish Litigation was a fair one and the $825,000 she received fully compensated Chabert and her children for their losses, was amply supported by the evidence, and was not clearly erroneous.

With the $132,000 previously paid death benefit received from SOPAC, Chabert received a total of $957,000. Under the circumstances, the Court was correct in finding that, as a result of Chabert's full recovery, SOPAC was entitled to recover from Chabert the $132,000 it advanced to Chabert pursuant to the National Agreement.

A quantum study of average damage awards at the time of Chabert's settlement, supports SOPAC's position that the finding of the District Court, affirmed by the Fifth Circuit, was not clearly erroneous. *See Fruge v. Dept. of Transp. & Development,* 536 So.2d 745 (La. App. 3rd Cir. 1988) *cert. denied,* 538 So.2d 593 (La. 1989); *Thomas v. State Farm Ins. Co.,* 499 So.2d 562, 566 (La. App. 2nd Cir. 1986), *cert. denied,* 501 So.2d 213 & 215 (La. 1987). In *Thomas,* the Court reviewed damage awards in actions like Chabert's and stated as follows:

> *Awards for the wrongful death of a spouse range from $7,500.00 to $200,000.00 with $100,000.00 be-*

> *ing the more frequent award* closely followed by $150,000.00. In wrongful death cases involving a parent, awards to minor children have traditionally been greater than awards to major children. For example, *awards to minor children range from $25,000.00 to $150,000.00,* with the most of those awards being at $40,000.00 and $100,000.00; awards to major children range from $20,000.00 to $75,000.00 with no specific concentration [Emphasis added.]

Footnote 2 relied upon by the Court in making the above-referenced statement set forth a string citation of Louisiana cases supporting this comment.

In addition, a review of Louisiana case law shows that Mr. Chabert's pain and suffering in the face of imminent death was also reasonably compensated by the settlement Chabert recovered. *See e.g., Thomas, supra,* 499 So.2d at 269 (awarding $7,500.00 for pre-impact fear).

Moreover, it is clear that the cases cited by Chabert do not support Chabert's argument that the Appellate Court's finding that Chabert was fully compensated was incorrect. First, it is clear that the cases set forth by Chabert attempt to show only the highest general damage awards to widows and/or children in cases of wrongful death. Notwithstanding this attempt, the settlement received by Chabert exceeds the general damage awards in each of the cases cited. Although Chabert argues that amounts paid in attorneys' fees should be deducted from her settlement award in considering whether she was fully compensated, it is clear that attorneys' fees were not deducted from the general damage awards of the cases cited by Chabert. Chabert cites no authority for the proposition that amounts paid as attorneys' fees must be deducted in determining whether Chabert was fully compensated. Moreover, the vast majority of the cases cited by Chabert are 1989 decisions, despite the fact that it is undisputed that Thomas Chabert died in 1982, and the Jefferson Parish

lawsuit was settled in mid-1987. Therefore, it is submitted that the *Thomas* case cited herein provides the Court with a more accurate picture of Louisiana law respecting wrongful death awards at the time of Chabert's state court action.

Accordingly, considering all of the evidence presented at trial, and considering the range of wrongful death awards in Louisiana courts at the time of Chabert's state action, it is clear that the Appellate Court's finding that Chabert was fully compensated by the $825,000.00 she received was a correct application of Louisiana law to the facts of this case.

Chabert points to no objective damages which remained uncompensated nor was her acceptance of the settlement at issue based upon the tort feasor's inability to pay. The evidence presented at trial clearly showed that Chabert not only accepted the compromise settlement received with full advice of counsel, she recommended the settlement on behalf of her minor children as "entirely fair." The evidence also showed that the State Court approved the settlement that Chabert recommended. Under these circumstances, the Appellate Court correctly found that Chabert's claim that she was not fully compensated was meritless and held that SOPAC was entitled to exercise its subrogation rights against the $825,000.00 recovered by Chabert to the full extent of its payment pursuant to the National Agreement.

STANDARD OF REVIEW

Rule 52 of the Federal Rules of Civil Procedure in pertinent part provides:

> In all actions tried upon the facts without a jury or without an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon...findings of fact, whether based on oral or documentary evidence, shall not

> be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.

It is well established law, that the findings of the trial court can only be disturbed if clearly erroneous. *Wiley Offshore Painting Contractors, Inc.*, 711 F.2d 602, 611, *rehearing denied*, 716 F.2d 256 (5th Cir. 1983). In cases that are tried to a judge, sitting without a jury, the function of the Appellate Court is not to decide factual questions *de novo. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1511 (1985). Where there are two permissible views of the facts, the fact finder's choice between them cannot be clearly erroneous. *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 1978 (1988). The trial court's decision to credit one testimony over another, where that version of the facts is not internally inconsistent, can never be clear error. *Anderson, supra*, 105 S.Ct. at 1512. *See Also Gifford v. National Gypsum Co.*, 753 F.2d 1345, 1347 (5th Cir. 1985). Similarly, the trial court's determination of damages can only be set aside if clearly erroneous. *Clark v. Mobil Oil Corp.*, 693 F.2d 500, 501 (5th Cir. 1982). It is well established that for a finding of fact to be overturned as clearly erroneous, it must leave the Appellate Court with a definite and firm conviction that the District Court has made a mistake. *City of New Orleans v. American Commercial Lines, Inc.*, 662 F.2d 1121, 1123 (5th Cir. 1981), *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, *rehearing denied*, 333 U.S. 869 (1948).

In the instant case, Chabert specifically attacks the findings of fact of the District Court below. Based on the above cited authority, such findings were not to be set aside by the Fifth Circuit unless clearly erroneous. In particular, Chabert attacked the trial court's credibility findings. Because the trial court had an opportunity to view the witnesses, its credibility findings were entitled to deference. *Gifford v. National Gypsum Company*, 753 F.2d at 347; *City of New Orleans v. American Commercial Lines,*

Inc., 662 F.2d 1121, 1123 (5th Cir. 1981) (credibility choices and resolution of conflicting testimony are within the province of the District Court setting without a jury, subject only to the clearly erroneous rule). Further, Chabert challenges the District Court's findings that Chabert was fully compensated for her damages. The lower court's damage determinations, like the court's other findings of fact, could only be set aside if clearly erroneous. *See Clark v. Mobil Oil Corp.*, 693 F.2d at 501.

Applying this standard of review, it is obvious that the Court of Appeals was correct in affirming the District Court and that the District Court's decision was not clearly erroneous.

CONCLUSION

Contrary to petitioner's arguments, the lower Courts correctly applied the Louisiana law applicable to the facts in this case, and found that Earline Chabert was fully compensated by the settlement and that, accordingly, The Southern Pacific Transportation Company was entitled to be reimbursed its $132,000.00.

More importantly, in review of petitioner's request for a Writ of Certiorari, petitioner has cited no important legal issues on which Courts are in conflict, and has suggested no important policy decisions upon which this Court should pass judgment.

Petitioner has not cited any dispositive Louisiana jurisprudence to show that the lower Courts erred. The unanimity of both of the lower Courts in this litigation shows clearly that there is no error in the Courts' handling of petitioner's claims.

Respondent respectfully submits that Earline Chabert's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICIES

A. District Court's denial of Earline Chabert's Motion for New Trial A-1

APPENDIX A

MINUTE ENTRY
HEEBE, J.
February 19, 1991

FILED
FEB 20 '91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOUTHERN PACIFIC TRANSPORTATION COMPANY	CIVIL ACTION
VERSUS	NO. 88-1019
EARLINE CHABERT	SECTION "B"

This cause came on for hearing on a previous day on the motion of defendant, Earline Chabert, for new trial pursuant to Federal Rule of Civil Procedure 59.

The court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendant, Earline Chabert, for new trial be, and the same is hereby, **DENIED.**

REASONS

On November 3, 1982, an accident occurred on the Greater New Orleans Bridge in which a Southern Pacific Transportation Company (hereinafter "SoPac") clerk, Thomas Chabert, died. On February 16, 1983, SoPac paid a death benefit of $132,000 to Mrs. Chabert pursuant to the National Agreement that existed between SoPac and the Brotherhood of Railway, Airline, and Steamship Clerks,

DATE OF ENTRY FEB 21 1991

Freight Handlers, Express and Station Employees. In accordance with the National Agreement and contemporaneously with the $132,000 payment, SoPac and Mrs. Chabert executed an agreement whereby SoPac was subrogated to Mrs. Chabert's rights up to $132,000.

Thereafter, Mrs. Chabert filed suit in Louisiana state court, individually and on behalf of her two minor children, against the third-party tortfeasors (hereinafter called the "Jefferson Parish litigation"). SoPac was not a party to the suit, but it knew of the suit's existence. On or about July 13, 1987, Mrs. Chabert, individually and on behalf of her two minor children, settled her claims for $825,000. However, Mrs. Chabert refused to repay SoPac the death benefit of $132,000.

To recover the $132,000, SoPac filed this diversity action against Mrs. Chabert, based on the subrogation agreement that it had with Mrs. Chabert. Mrs. Chabert then filed a counterclaim which alleged that if she had to pay anything to SoPac, then SoPac had to contribute to her legal expenses incurred in recovering from the third-party tortfeasors.

Upon completion of trial, the Court granted judgment in favor of SoPac in the amount of $112,574.94. The Court reasoned that, under the terms of the subrogation agreement, SoPac was subrogated to Mrs. Chabert's right of recovery up to $132,000. The Court noted that, under Louisiana law, an insurer ordinarily may not directly recover from an insured under a subrogation agreement, *citing* Southern Farm Bureau Casualty Insurance Co. v. Sonnier, 406 So.2d 178, 181 (La. 1981). The Court found, however, that an exception existed where the insured had been fully compensated for her injuries, *citing* Smith v. Manville Forest Products Corp., 521 So.2d 772, 775 (La. App. 2d Cir. 1988); *see also,* Audubon Insurance Co. v. Farr, 453 So.2d 232, 235 (La. 1984). The rationale was that an insured was not entitled to multiple recovery. Wallace v. Aetna Life and Casualty Insurance Co., 499 So.2d 577, 580

(La. App. 2d Cir. 1986), *citing* Liberty Mutual Insurance Co. v. Weinberger, 329 So.2d 254, 256 (La. App. 4th Cir. 1976). Therefore, upon finding that $825,000 fully compensated Mrs. Chabert and her children for their injuries, the Court held that SoPac could directly recover the $132,000 from Mrs. Chabert.

The Court did, however, require SoPac to contribute $19,425.06 toward Mrs. Chabert's Jefferson Parish litigation expenses. The Court reasoned that SoPac and Mrs. Chabert were co-owners in the right of recovery against the third-party tortfeasors; therefore, they had to proportionately share the cost of recovery, *citing* Moody v. Arabie, 498 So.2d 1081, 1085 (La. 1986). The Court held that since SoPac recovered $132,000 of the $825,000 total recovery, then SoPac had to contribute 16% ($132,000 divided by $825,000) of Mrs. Chabert's litigation expenses, *citing Id.,* at 1086.

Although Mrs. Chabert had a 40% contingency contract in the Jefferson Parish litigation, the Court found that $121,406.65 was a reasonable figure for Mrs. Chabert's litigation expenses. The figure was based on the hourly costs of Mrs. Chabert's attorney, Mr. Gaudry, plus court costs. Therefore, SoPac's recovery of $132,000 was reduced by 16% of $121,406.65 or $19,425.06.

Mrs. Chabert now moves for a new trial or, alternatively, for a modification of the judgment or to reopen the case to consider the deposition of SoPac's representative, Raymond Salassi. Mrs. Chabert claims that the Court admitted evidence that should not have been admitted, specifically communications between Mrs. Chabert and Mr. Gaudry and between Mr. Gaudry and Mr. Salassi. Mrs. Chabert also contends that Mr. Salassi's trial testimony was contrary to his deposition testimony. Finally, Mrs. Chabert avers that SoPac did not have a direct right of action against her, arguing that her agreement with SoPac was for subrogation, not reimbursement, citing *Sonnier,* 406 So.2d at 181. In the alternative, Mrs.

Chabert argues that the purpose of cases which allow the subrogee to collect directly from the subrogor is to prevent double recovery, citing State National Fire Insurance Co. v. Sykes, 527 So.2d 589 (La. App. 3d Cir. 1988). Mrs. Chabert asserts that the Jefferson Parish litigation did not fully compensate her, and thus, she has not received double recovery. She claims that she only received $340,035 of the $825,000, the rest going to litigation expenses and to her children.

Under Fed.R.Civ.P. 59, "[t]he grounds for a new trial or rehearing are broad and include contentions that the decision in question is against the great weight of the evidence, that the trial was unfair or that the Court committed a prejudicial error of law." United States v. Louisiana, 718 F.Supp. 525, 528 (E.D. La. 1989). A prejudicial error is one that "goes to the very heart" of the lawsuit. Midcontinent Broadcasting Co. v. North Central Airlines, Inc., 471 F.2d 357, 359 (10th Cir. 1973). Thus, "it is only those errors that have caused substantial harm to the losing party that justify a new trial." Wright & Miller, Federal Practice and Procedure: Civil § 2805.

Therefore, for a new trial, Mrs. Chabert must show that the Court was wrong in regard to a determinative legal or factual issue or show that in some way the trial was unfair. She has failed to meet this burden. She has failed to show that a subrogee does not have a direct right of recovery from the subrogor when the subrogor has been fully compensated. She has also failed to show that she was not fully compensated by the Jefferson Parish litigation. Although fair settlement does not always equal full compensation, Mrs. Chabert and her children were fully compensated by the monies received in the Jefferson Parish litigation. Moreover, Mrs. Chabert received $132,000 initially.

Thus, after reviewing the memoranda submitted by Mrs. Chabert and SoPac, the Court denies Mrs. Chabert's motion for a new trial or, alternatively, to modify the judg-

ment or reopen the case.

IT IS THE ORDER OF THE COURT that the motion of defendant, Earline Chabert, for new trial be, and the same is hereby, **DENIED**.

New Orleans, Louisiana, this 20th day of February, 1991.

/s/ Frederick J.R. Heebe

UNITED STATES DISTRICT JUDGE